UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 16378.

BURL MELTON HOWZE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTION.

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Northern Division. The appellant was sentenced to custody of the Attorney General for a period of one year and one day (R. 7-8).* Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law (R. 8-9).

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*R. refers to the printed Transcript of Record.

STATEMENT OF THE CASE.

The indictment charged appellant with a violation of the Universal Military Training and Service Act (R. 3-4). He became a registrant of Local Board No. 77 of the Selective Service System in the City of Bakersfield, California, in Kern County, California, and, it was charged that having theretofore been duly classified in Class I-O, did knowingly refuse and fail to comply with the order of his said Local Board No. 77 in that he failed and neglected to remain in specified civilian work contributing to the maintenance of the national health, safety and interest as provided in the said Act and the rules and regulations made pursuant thereto (R. 4).

Appellant pleaded not guilty, waived jury trial and was tried on November 12, 1958 (R. 7). A written motion for judgment of acquittal was filed (R. 5-6). The motion was denied and the appellant was found guilty and sentenced on November 12, 1958 (R. 7-8). A written Statement of Points on which Appellant Intends to Rely on Appeal was filed (R. 12-13). Said Statement contains all of the grounds that the appellant relies upon for reversal of the judgment in this case.

THE FACTS.

Appellant registered with Local Board No. 77 on August 14, 1953 (Ex. 2).* He filed his 8-page Classification

*Ex. refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

Questionnaire on October 12, 1953 (Ex. 5). In it he showed he was a farmer (Ex. 8), that he had pursued this work since early youth (Ex. 9) and that the products raised were alfalfa, cattle and hogs for an annual sale value of about $15,000.00 (Ex. 9). He also showed he was a conscientious objector to military activity (Ex. 11). Additionally, on October 12. 1953, his father filed an affidavit showing that appellant was regularly occupied as a farm worker and was essential to the operation of the farm, giving facts (Ex. 13).

He was mailed the Special Form for Conscientious Objectors by the Local Board (Ex. 14) and thereafter it promptly classified him in Class I-O, as a conscientious objector (Ex. 12). It ignored his claim and evidence for a lower classification, namely, II-C, agricultural worker.

Thereafter, on June 6, 1958, he was ordered to report to the local board on June 17, 1958, for forwarding to the Los Angeles Department of Charities for two years of civilian work. He reported to the board's office, as ordered and followed the instructions to proceed to the Los Angeles Department of Charities. There he refused the work assignment offered (Ex. 66).

QUESTIONS PRESENTED AND HOW RAISED.

I.

Was the draft board required to consider the claim and evidence presented by appellant for an agricultural classification? This question, and all others, was raised by the motion.

II.

Was the prosecution's burden met, or, as claimed by appellant, was there a failure of evidence in that the indictment was based on the charge appellant had failed to remain on the job and the evidence showed he had never started work?

III.

Does the Act as construed and applied by the Selective Service System violate the Thirteenth Amendment?

SPECIFICATION OF ERRORS.

I.

The district court erred in failing to grant the motion for judgment of acquittal.

II.

The district court erred in convicting the defendant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT.

I.

The defendant's *prima facie* showing for an agricultural classification was ignored, to his prejudice.

II.

A variance exists between the charge and the proof.

III.

Absent a real emergency requiring a federal labor draft, a peace-time labor draft, for unexceptional work, is contrary to the Constitution.

ARGUMENT.

I.

The Draft Board Violated Defendant's Rights under the Act and the Regulations to Have His Claim for an Agricultural Classification Considered Because It Completely By-Passed and Skipped Consideration of His Evidence.

The evidence shows appellant presented a *prima facie* case for a II-C classification, agricultural occupation. No contrary evidence, if any existed, was ever placed in the file. Therefore, he should have been classified in Class II-C. It was incumbent on the board to place adverse evidence in the file, as a justification for rejecting his claim. Worse yet, there is nothing to indicate that his claim was even considered. *Dickinson* v. *United States,* 74 S. Ct. 152.

The regulations of the Selective Service System, 32 C.F.R., Sec. 1623.2, require that a registrant be classified in the "lowest" class, according to a table which places II-C "lower" than I-O.

II.

There Was No Evidence to Show That the Defendant Is Guilty As Charged in the Indictment.

The appellant was indicted for one type of draft law violation, namely, that he "failed and neglected to remain in employment" (R. 4) and the evidence was bare of proof of this, the trial court accepting as proof of the charged

offense evidence (undisputed) that appellant had not started the employment (Ex. 66). The said evidence is clear that he had refused the work assignment. Appellant believes that more than a question of semantics is involved. The questions that arise here are how far indictment and conviction thereon must protect a defendant from the hazard of a future indictment in the same jurisdiction, for the sole act involved.

Initially, appellant submits that an indictment couched: "failure to perform a duty required by the act" would be too vague, for the Act imposes many dozen duties. This should need no argument.

Next, the history of Selective Service prosecutions shows a long-recognized distinction between the various offenses: for example, between failure to report for induction and failure to submit to induction.* With respect to civilian work, there is a long established distinction between failure to accept civilian work, as ordered, and failure to remain at the civilian work. In this connection, compare *Dingman* v. *United States,* 9 Cir., 156 F.2d 149, where the indictment properly charged Dingman "absented himself without authority" (149); *Roodenko* v. *United States,* 10 Cir., 147 F.2d 752, where "He was convicted of refusing to work and perform the duties assigned to him by the Director of C. P. S. Camp No. 111" (753); *Gormly* v. *United States,* 7 Cir., 136 F.2d 227, where, as in the case at bar the registrant didn't start work, he was

*The distinctions in the indictments involving such offenses are noted by this Court in its decisions; for example, in *Francy* v. *U. S.*, 217 F.2d 750, 751, and *Franks* v. *U. S.*, 216 F.2d 266, 267.

indicted for the exact offense (he didn't report for transportation to the work) the indictment reading failed "to report on the 24th day of August, 1942, etc." (229); *Kramer* v. *United States,* 6 Cir., 147 F.2d 756, where, as in the case at bar, the indictment was couched in very similar language:

> "Yet, these six males bolted the civilian camp; or, as put in the indictment, in June and July, 1943, each left the camp to which he had been assigned 'without being released or transferred by proper authority, and not in performance of assigned duties or authorized missions and without leave outside of said camp; contrary to the provisions of the Selective Training, etc., and the Rules-Regulations, etc.' " (757).

Also see *Gibson* v. *United States,* 67 S. Ct. 301 (companion case: *Dodez* v. *United States*), where each was indicted in accurate language, to describe his precise offense: Gibson for leaving the C. P. S. Camp, after 5 days there, and Dodez for refusing to go to the C. P. S. Camp.

The problem of variance was considered in *United States* v. *Tuffanelli,* 7 Cir., 131 F.2d 890, where a conviction was reversed, and *Heitman* v. *United States,* 9 Cir., 5 F.2d 887, was cited. Heitman held that where "the allegation of the place is a necessary part of the description of the offense" it "must be proved as laid." (888).

Appellant urges that the indictment should have been limited to the act shown by the proof, namely, that the work was never begun, and that the proof in such offenses should conform to the charge.

III.

The Act, As Construed and Applied by the Regulations and the Order to Report for Civilian Work Is in Violation of the Thirteenth Amendment of the United States Constitution Because It Calls for a Private, Non-Federal Labor Draft for the Performance of Services That Are Neither Exceptional nor Related to National Defense in Time of War or During a Declared Emergency.

The court's first thought on this point could well be that its Niles and Reese decisions,* among others foreclose this defense.

A.

This Defense Is Available.

The most recent consideration of any portion of the above-stated point, by this Court, was in the Reese case, in 1955. The argument presented on it and on the several other constitutional points was swept aside with the following comment, on page 773:

> "There is a short answer to this sweeping indictment. This Court has previously passed upon a similar and closely related contention and rejected it as being without merit. Niles v. United States, 9 Cir., 220 F.2d 278, affirming a judgment of the lower court in United States v. Niles, 9 Cir., 122 F. Supp. 382. A petition for certiorari to this Court in the Niles case was denied on May 23, 1955, 349 U.S. 939, 75 S. Ct. 784.

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*_Niles_ v. _United States_, 9 Cir., 220 F.2d 278; _Reese_ v. _United States_, 9 Cir., 225 F.2d 766.

"Appellant does not indicate in his briefs any reason for departure from the general doctrine announced in our Niles decision nor does he even refer to that opinion."

Two things are evident:

1. Reese is bottomed on Niles;**
2. Reasons "for departure from the general doctrine in our Niles decision" are presentable, if existing.

Let us first examine Niles. It shows that this Court's one paragraph *per curiam* opinion is based on the rationale of the district court's opinion, 122 F. Supp. 382. "The judgment of conviction is affirmed for the reasons given by the trial court, 122 F. Supp. 382". The district court's opinion, with respect to our Thirteenth Amendment point, reveals that it is based on *United States* v. *William Patrick Wylie,* No. 11060, N. Dist. (N. Div.) Calif., 1954, and *Heflin* v. *Sanford,* 5 Cir., 1944, 142 F.2d 798.

With respect to Wylie, it is to be noted that none of the rationale of this unreported decision is quoted by the district court, in Niles. Appellant believes an unreported district court case may be considered good authority, but it hardly need be added, only to the degree that is reasoned out and that its rationale is convincing. Appellant rep-

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**Research indicates that other courts have similarly bottomed their decisions on Niles: *United States* v. *Hoepker* 7 Cir., 1955, 223 F.2d 921 (using Niles at 923), affirming three district court rejections of "similar and closely related contentions"; each of the three district decisions in turn is bottomed on Niles: Smith, 124 F. Supp. 406, cites Niles at 410; Thomas, 124 F. Supp. 411, cites Smith at 415; Hoepker, 126 F. Supp. 118 also cites Smith, at 122.

resents that Wylie didn't raise the precise Thirteenth Amendment point raised here and, further, that the following *is* the reasoning given by the district court in disposing of *Wylie's* point:

> "As to the question as to whether or not the requirement that work of national importance be done with an agency other than an agency of the United States Government is under the 13th Amendment a punishment which violates that provision of the Constitution, I am at this time going to rule that that does not violate the 13th Amendment, and in that situation I am going to leave the matter for a court of appeal if the matter is carried to a court of appeal."

With respect to Heflin, it is readily to be observed that this was a case involving a registrant who *was doing* federal work *and during wartime.* He was in a Civilian Public Service Camp, a federally instituted and supervised system of civilian work for WW II registrants classified as conscientious objectors to all participation in military activity. It is therefore no authority for rejecting the present point, towit: that there is no emergency requiring a labor draft.

It is also to be noted that Judge Roche in his Niles district court opinion declared: "The constitutionality of the Selective Service Law has been attacked on many occasions. In every case the constitutionality of the law has been upheld. *United States* v. *Henderson,* 7 Cir., 180 F.2d 711; *Richter* v. *United States,* 9 Cir., 181 F.2d 591." (384).

A reading of those two cases shows they do not touch on the present point at all: Henderson decided only that

Congress could raise and support an *army* in peacetime. It is evident also that Henderson was argued on a First Amendment, religious liberty basis.

Richter emphasizes both the military and the emergency factors involved: "The government has the right to the military service of all of its able-bodied citizens, and may, when an emergency arises, justly exact that service from all." (592-593). After citing a case, this Court went on, in Richter: "The power to raise and support armies is not limited to time of war. Congress has the power to compel military service of a citizen in peacetime or wartime, whenever it declares that it is necessary or that an emergency exists requiring the raising of an army." (593).

It is submitted that the defense herein argued that a piece-time draft for *civilian* work requires an emergency situation is an open point.

B.

This Defense Is a Sound One.

In addition to our argument, hereinabove, that the point presented has not been foreclosed by any decision of this jurisdiction, there are reasons "for departure from the general doctrine" announced in the Niles decision, the phrase quoted being that of this Court in *Reese, supra,* at 774.

First, the many decisions against the *general* proposition of unconstitutionality, referred to hereinabove, boil down to the rationale of the district court's *Niles* decision, *supra.* If it is vulnerable, it is not a valid basis for any of the decisions using it even on the general proposition;

certainly, for the case at bar, another basis must be found, if any exists, for rejecting the point presented herein.

As noted, Judge Roche's Niles decision does not deal with the argument that is being presented here: that the Thirteenth Amendment is violated by a non-federal labor draft, *absent an emergency.*

There is no doubt we live in a troubled time. But hasn't this been said throughout all history, by many administrators and legislators, and with equal basis?

Does our civilian economy today have emergency need for hospital labor? Is a civilian labor draft required? If it be argued that Congress, by enacting a civilian labor draft has so found, then appellant urges it is the duty of the courts to declare otherwise. It is evident thousands are today engaged in putting more chrome and bigger dorsal and pectoral fins on automobiles. The point need not be belabored. While it is conceded that hospital work is essential, and that work in this field helps the national welfare, where is the proof of an emergency requiring a labor draft?

The Second Circuit, in upholding the conscription of labor in the aforementioned Civilian Public Service Camp pointed out that Congress obviously considered it was "* * * needed during a great national emergency * * *" *Brooks* v. *United States,* 1945, 147 F.2d 134, 134-135. Note that Brooks arose and was decided during wartime. It is also to be noted that Hoepker (the 7th Cir. decision, *supra,* in the footnote) in rejecting the constitutional attack therein made, refers to "The war power, which is

reserved to Congress, encompasses authority to conscript manpower to defend the nation *during a national emergency* (923) (Emphasis supplied). In the application of the Seventh Circuit's reasoning, with respect to "national emergency" it should be borne in mind that the orders to do civilian work in each of the three cases involved in its Hoepker decision were issued while the Korean emergency was still present: see *Smith, supra,* 409; *Thomas, supra,* 413; *Hoepker, supra,* 121.

The question is this momentous: absent national emergency, may Congress draft civilian labor?

(1)

No other federal labor draft has yet been passed by Congress. The action of the President in taking over the railroads and putting them in the hands of the army to prevent strikes is an evident interpretation of the Thirteenth Amendment, that it must be federal employment to give the power. While this is not directly in point it is of persuasive weight that the Government has no unlimited control over the relationship of private employer and employee but it does over its own employees. It is true that there are laws that authorize federal injunctions against strikes in certain national industries engaged in commerce. But that situation is not in point. The right to strike is one thing. Involuntary servitude is another.

The cases involving the civilian public service camps (*United States* v. *Brooks,* 54 F. Supp. 995 (S.D.N.Y.), affirmed *Brooks* v. *United States, supra,* cert. denied 324 U.S. 878; *Weightman* v. *United States,* 142 F.2d 188 (1st Cir.);

Hopper v. *United States,* 142 F.2d 181 (9th Cir.); *Zucher* v. *Osborne,* 54 F. Supp. 984) should be put aside in one broad sweep. It is obvious that such cases did not involve a drafting for private labor for nonfederal agencies, *and all arose during an emergency.*

(2)

Exceptional service such as labor in the federal maritime service or the Navy may be compelled without a violation of the Thirteenth Amendment. It is the same as the right of the federal Government to conscript manpower for military service. A consideration of the cases on the point shows that such services are, like military service, exceptional. They may be compelled as an exception to the general rule commanded by the Thirteenth Amendment.

(3)

The peonage cases are directly in point here.

It was compulsory private labor that was prohibited by the Thirteenth Amendment and the Anti-Peonage Law. In every case there was involved a state law or custom that produced the forced labor for private purpose. Had the laws been passed by the Congress instead of the state governments the results would have been the same. The Thirteenth Amendment would have invalidated the custom or laws even by the Federal Government compelling the work either directly or indirectly.

What is done by the Congress here is identical to that which was done by the state governments and condemned in the peonage cases. Here there is compulsory work of

a nature that does not come within the recognized exception of the Thirteenth Amendment, such as military service. The peonage cases would prohibit the drafting of young men as soldiers and putting them to work on the King Ranch in Texas or in the Broadway Department Store in Los Angeles. Soldiers could not be put in the state hospital to take care of mentally ill people without its being a violation of the principle of the peonage cases by the Supreme Court. Since a soldier cannot be thus drafted for compulsory labor without a violation of the Thirteenth Amendment, then the President also violates the Amendment when he orders a conscientious objector to work in the state hospital. The Amendment and peonage cases prohibit what is done in this case by the order made under Section 1660.1 of the Selective Service Regulations.

A very good discussion of the Thirteenth Amendment, its background and the earlier decisions under it appears in *Pollock* v. *Williams,* 322 U.S. 4, 7-13. The Court, at page 17 of the opinion, held that the Florida law imposed peonage upon certain persons under certain conditions. The statute made one who obtained an advance of money upon an agreement to render service guilty of a misdemeanor. The law provided for a presumption of fraud on the showing of obtaining the money on such agreement. This case involved the federal act passed to implement the Thirteenth Amendment. It is the law against peonage (322 U.S. at page 8). The Thirteenth Amendment, without a special act, has teeth against an act of Congress. (See *Hurd* v. *Hodge,* 334 U.S. 24, at pages 31-32). Mr. Justice Jackson for the majority of the Court said:

> "The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent with the general basis system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel." Pollock v. Williams, 322 U.S. at pages 17-18.

In the Slaughter House Cases, 16 Wall. 36, the Court held that the Thirteenth Amendment was not limited to protection of the Negro or to a prohibition of slavery. See 16 Wall. at pages 69, 71-72.

The other peonage cases, like *Pollock* v. *Williams,* 322 U.S. 4, lay down the rule that there can be no indirect violation of the Thirteenth Amendment. Criminal sanctions cannot be used to punish one who refuses to do forced labor or violates a labor contract. By force of the same reason the Amendment prohibits the use of the war-powers section of the police power of the state to be used to compel performance of work not of an exceptional character coming strictly under the old common law practice of service to the state of a nature which can be compelled. If the service does not relate directly to the war effort it cannot be said to be exceptional. It is not, therefore, an exception from prohibited forced labor under the Thirteenth Amendment purely because it was attached to war law. It is fundamental that the Constitution deals with realities and not with shadows (*Cummins*

v. *Missouri,* 4 Wall. 277, 325; *Ex parte Milligan,* 4 Wall. 2, 120-121). And there must be a direct relationship between the end aimed at and the power exercised.

Indirect and remote purposes or ends cannot be sustained purely because Congress has chosen to say they are to be done. Compare the other peonage cases (*Baily* v. *Alabama,* 219 U.S. 219, and *Taylor* v. *Georgia,* 315 U.S. 25) with *Pollock* v. *Williams,* 322 U.S. 4.

Hodges v. *United States,* 203 U.S. 1, involved an indictment seeking enforcement of the criminal sanctions clause of the Civil Rights Act. While the dismissal of the indictments was ordered the court wrote on the subject of "involuntary servitude" words used in the Thirteenth Amendment. The Court said: "The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof." 203 U.S. at pages 16-17.

It is submitted, therefore, that the order for the appellant to perform work at Los Angeles County Department of Charities and the regulations authorizing such order constitute a construction and application of the statute

which makes it unconstitutional, because it is brought into conflict with the mandate of the Thirteenth Amendment.

CONCLUSION.

For the reasons above stated the judgment of conviction should be reversed.

Respectfully submitted,

J. B. Tietz,
Attorney for Appellant.

May 10, 1959.